LIM ENG CHUAN SDN BHD

v.

UNITED MALAYAN BANKING CORP BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[ORIGINATING SUMMONS NO: MT1 (MT2) 24-248-1997]
3 JANUARY 2005

LIMITATION: *Land - Sale of land under debenture - Letter of demand and accrual of cause of action - Whether sale made within six-year time bar - Whether s. 6(1)(a) Limitation Act 1953 applied to sale - Meaning of action under s. 2(1) - Whether sale caught by time bar - Bank's right to sell land under debenture, whether independent of charge under National Land Code - Power of attorney executed by borrower/company, whether affected by liquidation*

BANKING: *Securities for advances - Debenture - Debenture secured by charge over land - Sale of land under debenture - Letter of demand and accrual of cause of action - Whether sale made within six-year time bar - Whether sale caught by time bar - Bank's right to sell land under debenture, whether independent of charge under National Land Code - Power of attorney executed by borrower/company, whether affected by liquidation*

WORDS & PHRASES: *"action" - Limitation Act 1953, s. 2 - How widely to be interpreted - Suit or any other proceeding in a court of law - Right to sell land under debenture*

In consideration of certain credit facilities granted by the 1st defendant bank ('D1') to it, the plaintiff company had: (i) registered a charge over certain plots of its land ('the land') in favour of D1; (ii) created a debenture in respect of some of its assets in favour of D1; and (iii) executed a power of attorney appointing D1 as its attorney. As it transpired, subsequently, the plaintiff defaulted in the repayment of the credit facilities and D1 disposed of the land to the 2nd defendant ('D2') under the debenture and power of attorney. Thus, by the instant application, the plaintiff prayed for a declaration that the sale of the land was invalid on the grounds that: (i) D1's right to sell the land under the debenture had been time-barred under the Limitation Act 1953 ('the LA'); (ii) D1 should have applied to the court for an order to sell the land under the National Land Code ('NLC') in accordance with the Federal Court's landmark decision in *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra*

Malaysia Bhd & Ors [1997] 3 CLJ 274 and O. 83 of the Rules of the High Court 1980. Subsequently, however, the plaintiff was wound up but the winding-up order was stayed.

Held (dismissing the plaintiff's application):

[1] The power of attorney was valid and was not affected by the plaintiff's liquidation, especially in view of the order of stay. (pp 275 h, 276 a-f, h & 277 a)

[2] The 1st defendant was empowered to sell the land under the debenture, it being a security independent of the charge under the NLC. (pp 276 d-e, h & 277 a-d, e-f)

[3] The wide, inclusionary definition of the word 'action' in s. 2(1) of the LA would apply in respect of D1's right to sell the land under the debenture. Consequently, s. 6(1)(a) of the LA would also apply in respect of D1's rights under the debenture. **Nevertheless,** on the facts of the case, D1 had exercised its right to sell the land well within the six-year limitation period. (pp 277 g-h, 278 a-h, 279 a-g & 280 a-h)

Case(s) referred to:

K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF (Unreported) (Mahkamah Persekutuan Rayuan Sivil No: 02-11-2003 (W)) ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Melantran Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor [2003] 2 CLJ 86 FC ***(refd)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank Bank Bhd [1989] 3 MLJ 155 ***(refd)***

Wellington Steam Ferry Company Ltd (In Liquidation) & Anor v. The Wellington Deposit, Mortgage and Building Association Ltd [1915] 34 NZLR 913 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 108
Evidence Act 1950, s. 114(e)
Limitation Act 1953, ss. 2, 6(1)(a)
National Land Code, s. 256(2)
Rules of the High Court 1980, O. 83

Other source(s) referred to:

Krishnan Arjunan & Low Chee Keong, *Lipton & Herzberg's Understanding Company Law in Malaysia*, p 176
O' Donovan and John C Phillips, *The Modern Contract of Guarantee*

For the plaintiff - Gregory Dicom; M/s AG Dicom & Co
For the 1st defendant - Wong Kian Kheong (Anita Ibrahim); M/s Lee Hishammuddin
For the 2nd defendant - SS Muker; M/s Muker & Assoc

Reported by Alec KC Lee

JUDGMENT

Suriyadi Halim Omar J:

The first defendant by a letter of offer dated 16 September 1983, produced and marked as L-1, had offered to the plaintiff various banking facilities. As security, the plaintiff had charged its properties held under grant no. 10672-10678 for lots 143-149, Section 14 Bandar and Daerah Klang Selangor (hereinafter referred to as the said lands) *vide* a charge dated 13 March 1984 (L-2 A & B).

As further securities, the plaintiff had executed a debenture instrument dated 10 March 1984 (marked as L-3), and a personal guarantee (L-4) together with its directors in favour of the first defendant. In every aspect that debenture was in order, as it had been secured by a charge over the borrowing company's property ie, the plaintiff (*Lipton & Herzberg's Understanding Company Law in Malaysia* by Krishnan Arjunan and Low Chee Keong; see also s. 108 of the Companies Act 1965)).

Due to bad times, the plaintiff had failed to service the facilities, which had led to the filing of legal proceedings against the plaintiff as a guarantor on 11 December 1991 as per KL Civil Suit D1-22-1691-1991 by the first defendant. The latter case is still being proceeded with by the first defendant *albeit* facing stiff resistance from the plaintiff. That court action is another story and merely incidental to the current one.

By various letters dated 22 March 1995, 28 April 1995 and 16 May 1995 the first defendant had informed the plaintiff of its intended action to exercise its rights under the debenture. Advertisements were placed in the relevant local vernacular and tenders were invited for the sale of the said land. In the midst of all these activities, sometime on 29 September 1994 an order of winding up was successfully obtained against the plaintiff by a third party ie, Automative Corporation Sdn Bhd. resulting in the plaintiffs inability to object to the ongoing tender pursuant to the debenture. Matters became more complicated when the plaintiff's shareholders settled the debts and successfully stayed the winding up order (though for some unknown reason had not set aside the order).

As regards this current case, in its attempts to recover the debts due, the first defendant had merely adverted to the debenture thus sidelining any foreclosure proceedings or judicial sale pursuant to the National Land Code, read together with the requirements of the Rules of the High Court 1980. In the course of the hearing the plaintiff had highlighted that certain parties connected to it had frantically attempted to join the bid affray, but had met with frustration as the said land was eventually sold to the second defendant, as per L-13 dated 24 October 1995.

Now the plaintiff, in a gist, wants to set aside that sale by the first defendant to the second defendant, on the premise that the sale vide the debenture was invalid as its *[advertence]* was inhibited by time factor. The plaintiff had explained that the debenture was exercisable on demand as provided for under section 6.01 of the debenture. To support its contention of the demand requirement and strict adherence to time factor the plaintiff had referred to the case of *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Bank Berhad* [1989] 3 MLJ 155. In that case the Supreme Court had indeed held that an antecedent demand was a pre-requirement before filing a claim against a guarantor.

Inspite of the prevalence of many letters in the like of those dated 22 March 1995, 28 April 1995 and 16 May 1995 the plaintiff had ignored them but had merely focused on the demand letter dated 24 July 1989 (L-15). This letter in crystal clear terms had stated that an outstanding sum of $1,617,252.61 was due and owing to the first defendant as at 15 July 1987. Notice was thus given, *[intimidating]* that any failure to pay up the owed sum would result in legal proceedings being undertaken to recover it, inclusive of foreclosure proceedings. Due to the alleged lapse of time as regards the allusion to the debenture, the first defendant was supposed to have been time barred by 24 July 1993. To reiterate, the sale to the second defendant was on 24 October 1995 way past the limitation period.

The point of reference of the plaintiff pertaining to the demand factor *vis-a-vis,* the issue of limitation of time and strict adherence was s. 6(1)(a) of the Limitation Act 1953 and *The Modern Contract of Guarantee* by O'Donovan and John C. Phillips, in which were authored these words:

> Thus ... In *Commercial Bank of Australia v. Colonial Finance Mortgage Investment and Guarantee Corporation* ([1906] 4 CLR 57) ... the guarantee stated that the guarantors undertook to pay the debts of the customer "in case the customer shall make default in payment thereof respectively or of any part thereof respectively on demand." It was held that a cause of action arose against the guarantor in respect of the principal debt once the customer was in default **and a demand had been made on the customer.** Thus the **Statute of Limitation** began to run against the creditor only when both these conditions were satisfied. (emphasis added)

Banking on the Limitation Act, and supported by the above authoritative view, the plaintiff had submitted that the transaction of the sale and purchase of the said land on 24 October 1995 was therefore invalid, as time had begun to run once that demand had been made. Here time had run out by the time the deal was sealed. I pause here for a moment.

Apart from the above complaint the non-appointment of any Receiver and Manager, after the first ones were terminated on 15 May 1989 to conduct the sale, had also made the tender invitation for the said land flawed. Thereupon the plaintiff prayed for orders in term, *inter alia*, that:

i. A declaration be meted down declaring that the first defendant was not entitled after 23 July 1993 to enforce its rights under the debenture dated 10 March 1984 executed by the plaintiff in favour of the first defendant premised on it being time-barred;

ii. the first defendant therefore was not entitled to execute the sale & purchase agreement dated 24 October 1995 as attorney to the plaintiff pursuant to a power of attorney clause contained in the debenture as regards the said land;

iii. the sale of the said land therefore too was null and void and of no effect between the first and second defendants; and

iv. that the sale of the said land to the second defendant be set aside.

At the early stages of the hearing the plaintiff had submitted that the sale instead should have been subject to s. 256(2) of the National Land Code read together with O. 83 of the Rules of the High Court, and even if *[advertence]* to the debenture had taken place, the transaction was invalid due to the above argument of time-bar. Even if it had not been time barred, the sale was flawed by virtue of the non-appointment of a Receiver and Manager, under section 6.02 of the debenture for purposes of the sale. Its argument therefore was multi-pronged.

As regards the issue of the non-appointment of a Receiver and Manager, the stance of the first defendant was that as the debenture had appointed it as the plaintiff's attorney for the purpose of sale (section 6.06 of the debenture) its action was in order.

So, what is so unique about a power of attorney that holds so much authority and persuasive power? Suffice for purposes of this case if I were to state that a power of attorney is a formal delegation, made in writing and usually under seal, empowering the donee, in this case the first defendant, to act on behalf of the donor (plaintiff). The purpose and powers will be defined within the limits of the instrument, and in favour of third parties, rendering all acts done

by the donee to be binding on the donor as effectually as if the third parties had dealt directly with the donor himself. Needless to say the delegation of the purpose and authority must be legally possible and within the capacity of the donor to give. In essence what is flowing from the donor to the donee is the authority.

Further, every experienced legal practitioner knows that s. 114(e) of the Evidence Act 1950 provides that a court may presume that any judicial and official act done has been regularly done. This provision when resorted to invariably support the position of the current first defendant, as with its promulgation the burden of proof statutorily shifts to the plaintiff, thus placing it in an unenviable position of rebuttal. It is thus burdened with the responsibility of rebutting the regularity of the power of attorney, which had been deposited in the High Court, apart from explaining why there was no challenge to it.

After a scrutiny of the evidence I was satisfied that a valid power of attorney had indeed been executed appointing the first defendant as the plaintiff's attorney. That meant it had ample authority, and hence *prima facie* empowered to sell, bearing in mind that that document had been duly deposited with the High Court and evidentially never challenged. Regardless of the simplicity of that statement two more questions must be answered *viz*.:

1. if the plaintiff at the relevant time had been wound-up was the power of attorney considered cancelled; and

2. in the circumstances of the case, as a stay of the winding up order had been obtained by the plaintiff, what was the effect *vis-a-vis* the sale?

The law as to the first question is quite clear, in that the status of the power of attorney granted by a company, later to be wound-up, in this case the plaintiff to the first defendant, is not cancelled by that winding-up order *Wellington Steam Ferry Company Limited (In Liquidation) and Another v. The Wellington Deposit, Mortgage and Building Association Limited* [1915] 34 NZLR 913; *K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF* [Mahkamah Persekutuan Rayuan Sivil No. 02-11 - 2003 (W)].

I now answer the second question. It is my view that if a full-blown winding-up order has no ill effects on that power of attorney surely that stay order granted by a court merely strengthened the hands of the first defendant being a secured creditor *(K Balasubramaniam v. MBF Finance Bhd (supra))*. I was satisfied in the circumstances of the case, having perused the debenture especially sections 6.02, 6.03, 6.04, 6.05 and 6.06 and as the sale had been

pursuant to that power of attorney undertaken by the first defendant, the factor of want of Receiver and Manager had become quite irrelevant. The first defendant being a secured creditor had chosen the easy way out of alluding to the power of attorney embedded in the debenture to transact the sale rather than appoint a Receiver and Manager to act for it (see section 6.02 © of the debenture which provides for that discretion).

Moving on from there, with the issues of power of attorney and the Receiver and Manager argument out of the way, necessity dictates me to move on to the contentious next stage ie, the allusion of the debenture supposedly invoked out of time.

Along the way during the submission, in particular after the first defendant had submitted that the debenture was an alternative security exercisable by a secured creditor, independent of the charge under the National Land Code, the plaintiff had made a few adjustments in its stance. This time the plaintiff conceded that the first defendant was certainly entitled to select any one of the securities to secure the realization of the defaulted sum. I too must endorse this view, in that those security charges were independent of each other.

Despite that change of stance, the plaintiff strangely had pressed on to state that despite that concession, and despite the first defendant's right to advert to the debenture, the sale was still flawed as s. 256(2) of the National Land Code and O. 83 of the Rules of the High Court had not been complied with. Having taken into consideration the concession by the plaintiff that these three securities were independent of each other I was moved to reject the latter's legal approach. I was satisfied that so long as the provisions of the debenture instrument, more so as the power of attorney was valid, and any other connected statutory requirements had been complied with, the sale thus was good without the necessity of going through the processes of a judicial sale (see *Melantran Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2003] 2 CLJ 86; *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274).

But must a notice of demand be sent first before enforcing the sanctions of the debenture? To answer this question, perhaps it would not be incorrect to approach the matter by stating that to preclude the enforcement of any debenture of any time frame, after a notice of demand has been sent, would import uncertainties to the borrower, as he would be beholden to the arbitrary time frame of the debenture holder. As admitted by the first defendant, if in a foreclosure action a period of twelve years is still imposed by Parliament why not this sale? Needless to say, as a notice of demand had not be specifically provided for to be precluded in the debenture instrument, in stark contrast to the need for it, any argument of denial of its requirement was a

none starter. As far as I was concerned agreeably a demand was required before the debenture was to be enforced by the first defendant. Evidentially if six years had not lapsed after the appropriate or proper letter of demand had been sent out ie, when the cause of action had accrued, and as stated earlier the other prerequisites of s. 6 of the Limitation Act had been complied with, then the sale under the debenture was not flawed.

To appreciate the issue here a reproduction of s. 6 of the Limitation Act is necessary. Section 6 reads:

> 6. Limitation of actions of contract and tort and certain other action
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognizance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

Returning to the above provisions, to fall within the ambit of the above s. 6, and without much legal discussion, suffice to say that the impugned debenture qualifies as a contract. *Lipton &Herzberg's Understanding Company Law in Malaysia* by Krishnan Arjunan and Low Chee Keong at p. 176 even had occasion to write:

> The term "debenture" does not have a precise legal definition as it is the nature of a genus, not a species. It is a document which acknowledges the indebtedness of the company. The debt is often secured by a charge over the property of the company but this is not necessary. **The relationship between the company and a debenture-holder is governed by the law of contract** and if the debenture is secured, also by property law (emphasis added).

The action of the first defendant to sell the said land founded on that contract/debenture, ie, after the cause of action had accrued brought into being by the demand letter, fell squarely within the four corners of the terminology of "action" as promulgated under s. 2. This section reads:

2. Interpretation.

action **includes** a suit or any other proceeding in a court of law; ... (emphasis added)

By the canon of construction, bearing in mind that the above definition is non-exhaustive, as the term "includes" has been legislated by Parliament, I am convinced that a sale under the impugned debenture is certainly covered by it. Not only does s. 6 cover suits or any court proceedings but also actions under (a), (b), (c), and (d) of sub-section 1 of s. 6, which are independent of court proceedings. It is trite that the Limitation Act is a procedural law that must be strictly construed within the context of its provision and purpose. This Act must be construed wherever possible in the light of the principles of natural justice, which must inevitably tilt towards the facilitation of justice and eventually furthering its ends. With those ends in mind and the terminology of "action" being wide enough to include the impugned sale, my next step would be to identify that correct letter of demand sent by the first defendant, purposefully to check on the time factor.

Having perused the evidence it my view that the first defendant was never time barred, as the correct notice of demand to be considered must be that of L-6 found at p. 51 of En 2 and not of L-15 (p. 107). L-6 is dated 16 May 1995 whilst L-15 is dated 24 July 1987. I am unable to submit to the plaintiff's interpretive view that L-15 is a catch-all notice that will bind any of the securities without the necessity of identifying the targeted intended security. To acquiesce to such a view would militate against the concession by all parties that all the three securities were independent of each other. Naturally, in the event the threats of that notice ie, L-15 were to be crystallized, then all the relevant requirements of the National Land Code and strict procedural compliance of the Rules of the High Court 1980 must be adhered to.

Let us review L-15 dated 24 July 1987 which verbatim reads:

TAKE NOTICE that we are now instructed to demand from you, which we hereby do, payment of the sum $1,617,252.61 together with interest thereon and our legal costs of $30.00 to our clients or to us as their solicitors within fourteen (14) days from the date hereof, failing which legal proceedings including foreclosure proceeding will be instituted against you for the recovery thereof and all legal expenses are to be borne by you.

The first defendant had ingeniously argued that this letter was not a demand letter under the debenture but a demand for outstanding sum, failure of which to pay would result in legal proceedings, inclusive of foreclosure action. The latter had stressed that nothing was stated in that letter of the issue of the debenture. Having appreciated the language of the letter I was satisfied that the sender of this letter had legal proceedings only in mind in the event of non-payment of the debts due. Naturally if the debenture were to fall within the context of legal proceedings then the sale would be flawed as it would be time-barred but not otherwise. To reiterate, apart from concluding that this demand notice merely targeted the legal charge pursuant to the National Land Code, the enforcement of the sale under this debenture therefore does not fall within that envisaged legal proceedings (L-15).

Returning to the main stream if a proper notice of demand, which identified the debenture as the foundation of that demand were sent out, and six years did go by, any sale after that period would be invalid. I now make a finding of fact that L-15 was never the proper notice of demand connected to the sale of the impugned land. After sifting the evidence I was satisfied that the correct and proper letter of demand, in relation to the enforcement of the debenture to be considered, was L6C (en. 2 p. 51), dated 16 May 1995. This letter sent by the first defendant's solicitor to the plaintiff read:

> We write further to our letter dated 5th. May 1995.
>
> Our instructions are to give Notice (which we hereby do) that following our client's exercise of their right to take possession and control of the premises under reference our client will now, **pursuant to section 6.05 of the debenture** dated 10th May 1984 at the expiry of seven (7) days from date hereof proceed to sell the said property.
>
> The aforementioned sale will be pursuant to the terms and condition of the debenture be in such manner as our client shall think proper ... (emphasis added).

The above demand letter not only indicated that the debenture was adverted to but had even meticulously mentioned the relevant section. To cut the matter short, suffice if I were to conclude that as the letter was dated 16 May 1995 and the sale was dated 24 October 1995 the transaction was never in danger of being time-barred.

It is without hesitation that this application be dismissed with costs.